IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.6787 OF 2005

Pradeep Dhond .. Applicant
Versus
Intelligence Officer, Narcotics Control Bureau, Ballard Estate and Anr. .. Respondents

Mr.K.T.S.Tulsi, Senior Advocate with Vikas Pahwa, V. Hari Pillai, Rajesh Sharma and J.S.Saluja for applicant
MrD.N.Salvi with Raja Thakare for respondent No.1
Mr.S.S.Tatkare, A.P.P. for State.

CORAM : S.C.DHARMADHIKARI, J.
DATE : 7th February 2006.

P.C.

. This is an application for bail by the applicant who is accused No.3 in N.D.P.S. Special Case No.59 of 2005 which is filed by respondent No.1. Applicant was arrested on 4th February 2005 and is in custody ever since. Brief facts necessary for deciding the

application are as follows:-

2. The prosecution, on the basis of the intelligence information, arrested two Nigerian nationals at Sahar International Airport. Search of their baggage resulted in recovery of 17976 Ampoules of Fortwin Injections containing Pantacozine manufactured by M/s.Ranbaxy Laboratories. It is alleged that these persons in their statements informed that one person residing in Nigeria had given them address of a shop viz., Silverpoint Overseas (India) situate at Masjid Bundar, which allegedly belongs to the applicant. It is alleged that applicant sold them 18000 ampoules and some amount was paid in cash.

3. On 1st November 2004 residential premises of applicant were searched and certain documents are allegedly recovered. During investigations, statements of various persons were recorded

including that of the daughter of applicant. One Manohar Ainani of M/s.Gujarat Marketing in his statement has admitted the fact that petitioner was operating his business in association with Gujarat Marketing and was using their drug licence. He was even his authorised signatory and operating bank account with M/s.ABN Amro. Mr.Anilkumar Bansal of M/s.Haryana Medicos in his statement had stated that Fortwin injections were supplied to applicant while acting on behalf of Gujarat Marketing. The applicant was arrested as above. In April 2005, Narcotics Control Bureau (NCB) filed a complaint against petitioner and two other accused invoking provisions of N.D.P.S. Act. The complaint was filed in the court of learned Special Judge (NDPS) Mumbai. Application for bail preferred by the petitioner has been rejected by learned Special Judge vide his order dated 18th August 2005.

4. Mr.Tulsi, learned Senior Counsel

appearing in support of this application contends that it cannot be said that petitioner has committed any offence under N.D.P.S. Act. He was at pains to invite my attention to a certificate which was issued by Ministry of Commerce, Government of India, in favour of Gujarat Marketing. This is a certificate of Importer and Exporter Code (IEC). He submits that Form 20B in which licence to sell, stock, or accept or offer for sale, or distribute by wholesale Drugs is in favour of two persons, who are partners of M/s.Gujarat Marketing. He submits that this licence is in force from 29th October 2002 to 28th October 2007. Gujarat Marketing has its business premises at Ahmedabad in the State of Gujarat. He invited my attention to the conditions of licence. He has also invited my attention to Form 21B. He then invites my attention to a letter dated 13th May 2004 addressed to Assistant Drug Controller, New Delhi. In the submission of Mr.Tulsi,

Pantacozine is an injection manufactured by number of multi-national companies including Ranbaxy. They come in the category of Analgesic. He submits that once the applicant is allegedly associated with M/s.Gujarat Marketing who hold a valid IEC and therefore, authorised to sell the drugs including those falling under the category of Schedule "H" Drug under the Drugs and Cosmetics Act and, therefore, it is not as if the operations which are indulged in by the petitioner are in violation of NDPS Act. He submits that the applicant is not guilty of any offences under the NDPS Act. He has invited my attention to section 27(c), 27A, 28, 29 of NDPS Act. He submits that none of them are mentioned in section 37 of NDPS Act. He submits that no facts alleging offences under section 27A have been set out. In these circumstances, the order of trial court is unsustainable. That apart, he has invited my attention to the provisions of section 8(c), Schedule to the NDPS Act, Rules

viz., NDPS Rules and Schedule I thereto and contends that the operations are clearly saved by section 8(c)(exception) thereto and, therefore, the applicant deserves to be enlarged on bail.

5. Mr.Salvi on the other hand contends that the applicant is not a partner of the firm M/s.Gujarat Marketing but he is an associate of the firm. He invites my attention to Form 20B, licence issued in the subject case in favour of M/s.Gujarat Marketing and the terms and conditions. He has invited my attention to page 296 of the charge sheet where a statement is recorded of the persons concerned with M/s.Gujarat Marketing and it is stated therein that the applicant is involved as authorised representative of M/s.Gujarat Marketing. He is operating all bank accounts. Mr.Salvi supports the order of the learned Special Judge.

6. After perusing the application and

considering submissions of both sides, in my view, the facts and circumstances which are set out in the present application are more or less identical to Criminal Application No.3295 of 2005.

7. Further, it is pointed out by the applicant in the bail application itself that as far as he is concerned, he is operating his business in association with M/s.Gujarat Marketing. M/s.Gujarat Marketing was duly authorised to sell, stock or distribute drugs as also export them as per the Import Export Code. Applicant being authorised signatory of M/s.Gujarat Marketing in their bank account and dealing in drugs and pharmaceuticals, it is clear that unless and until it is established that the operations were carried on by applicant are prohibited expressly, then NDPS Act cannot be invoked.

8. Pentazoine is a "Schedule H" prescription drug and notified as such under the D & C Act. As far as provisions of NDPS Act are concerned, according to learned Special Judge, petitioner purchased, possessed and transported in India and exported out of India seized ampoules of Fortwin injections and thereby committed offence under section 29 read with 28(c), 22(c) and other provisions referred to by him of the NDPS Act and, therefore, section 37 being attracted, bail application cannot be granted.

9. Learned Trial Judge has proceeded on the basis that the ampoules were supplied to the applicant in turn to be handed over to the co-accused and they were found in possession thereof at the Airport. In my view, all such submissions overlook the provisions of the Act as well as rules.

10. For the purpose of NDPS Act, it is clear

that the concept Psychotropic Substance is defined in Section 2(xxiii) which reads thus:-

> "(xxiii) Psychotropic substance" means any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the Schedule"

11. As far as "The Schedule" to the Act which contains list of Psychotropic Substance at Item No.27 - Pentacozine is mentioned. However, as far as the NDPS Rules are concerned Chapter VII dealing with Psychotropic Substances contains General prohibition vide Rule 64 reading thus:-

> "64. General Prohibition - No person shall manufacture, possess, transport, import inter-State, export inter-State,

sell, purchase, consume or use any of the psychotropic substances specified in Schedule I."

12. A bare perusal of the said Rule would indicate that general prohibition is qua the operations stipulated in Rule 64 and with regard to Psychotropic Substances specified in Schedule I. Mr.Salvi does not dispute that Pentazoicene is not mentioned in Schedule I to the Rules. In this view of the matter, my reasoning in Criminal Application No.3295 of 2005 would squarely apply in this case as well.

13. The bail application before the trial Court was argued on the basis that Narcotic Drugs and Psychotropic Substances Act (NDPS Act for short) itself does not prohibit operations which are carried on by the accused. The argument proceed on the basis that if relevant provisions of the Act and the Rules as well as Schedules

appended thereto are perused, then, it is prima facie clear that operations in question are not covered by the prohibitory measures envisaged by the Act. Therefore, the Act itself is inapplicable and the bail application will have to be considered on this basis. Once, it is considered on this basis, then, the embargo contained under Section 37 would not apply.

14. It is further clarified that I have considered the submissions of both sides on the above premise and basis and my conclusion would necessarily govern the facts and circumstances in this case. Ultimately, the prohibition contained in the statute must be seen in the context of individual operations and the Psychotropic Substance in question. It is only thereafter that bail applications raising such a plea can be decided.

15. For the reasons set out therein this

application is granted. Hence following order:-

(a) Applicant is enlarged on bail in the sum of Rs.40,000/- with one/two sureties in the like amount.

(b) Applicant shall attend NCB Zonal Office, New Delhi on every Monday till investigation in this case is over;

(c) Applicant shall not leave India without prior permission of the Special Court.

(d) Applicant shall deposit his Passport with the I.O. immediately after his release.

(e) Applicant shall make himself available to Mumbai office of NCB for the purpose of investigation.

. After the order was pronounced, learned Counsel appearing for applicant submitted that since the applicant is resident of Mumbai, the direction that he should report to NCB, New Delhi be modified and it be directed that on his release on bail, applicant shall report to NCB, Mumbai. Accordingly, the direction in clause (b) is deleted. Applicant shall report to NCB, Mumbai on every Monday till the investigation is over.

(S.C.DHARMADHIKARI, J)